

**UNIVERSITY OF CALIFORNIA,
SAN FRANCISCO****CONTRACT NO. V662P-4744****VABCA-4661****VA MEDICAL CENTER
SAN FRANCISCO, CALIFORNIA**

William A. Roberts III, Esq., and *Karen L. Manos, Esq.*, Howrey & Simon,
Washington, D.C., for the Appellant.

James Petersen, Esq., Trial Attorney, *Charlma Jones, Esq.*, Deputy Assistant General
Counsel and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C.,
for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE McMICHAEL
On Cross Motions for Summary Judgment**

The University of California, San Francisco (UCSF or Contractor) appeals a claim by the Department of Veterans Affairs (VA or Government) seeking to recover certain sums paid to the Contractor under a series of six extensions to a negotiated firm fixed price contract for anesthesiology services. Alleging that the Contractor failed to supply certified cost and pricing data to support its 27% price increase in contract extensions, the VA final decision sought to recover \$169,400, the difference between "what was paid to UCSF and the amount reflected [in] UCSF's payroll records."

UCSF has filed a MOTION FOR SUMMARY JUDGMENT asserting that the Government may not recover moneys paid because the contract did not contain a "Price Reduction for Defective Cost or Pricing Data" clause. Moreover, even if that clause is found to be incorporated into the contract via the *Christian* doctrine, the Contractor argues that, at some point in the series of negotiated contract extensions, it disclosed all relevant information to the VA concerning the "administrative costs" identified in the final decision. Because the contract price was not modified in subsequent contract extensions, it is "clear that the price negotiated would not have been different if the data had been disclosed earlier."

In its OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT, the Government maintains that UCSF failed to provide required cost or pricing data which was complete or accurate. In particular, it points out that the Contractor "failed to provide any of the comprehensive records of historical costs related to the contract" recorded in its "*Departmental Reports of Appropriations and Expenditures: Anesthesiology--Federal Contract*." These reports, first obtained during discovery following appeal to the Board, provide detailed information on costs incurred under the contract which revealed them to be "significantly less than represented to the VA during negotiation" of the contract modifications in question. The Government asserts that those reports document, *inter alia*, anesthesiologist salaries which were less than those represented by the Contractor. Because it is to be "reasonably expect[ed]" that this historical cost information would

"significantly affect" contract negotiations, the Government contends that it has established "*prima facie* liability" which compels the denial of UCSF's summary judgment motion. Moreover, relying on the *Departmental Reports*, it argues that it is entitled to "partial summary judgment" of "at least \$115,613.24 with respect to the first and second contract extensions."

In Reply, UCSF claims that the *Departmental Reports*, contrary to Government assertions, are "not reports of actual historical costs incurred," but merely "report *projected* hours to be worked by the anesthesiologist on the contract." Moreover, even if the reports contained the information as characterized by the VA, Appellant argues that the Board is without jurisdiction to consider them as a basis for cost adjustment because they constitute a "new claim" which has not been the subject of a Contracting Officer's final decision. They conclude that the Board is limited in this appeal to considering only the question of unallowable "administrative costs" referenced in the final decision.

The record for purposes of our consideration of the Cross Motions for Summary Judgment consists of the pleadings, the motions and responses with attachments and affidavits, together with the Appeal File as supplemented (R4, tabs 1-121, 500-07). The facts for purposes of the summary judgment motions are as follows.

FINDINGS OF FACT

For approximately nine years the Government had been negotiating annual contracts with UCSF for the "Scarce Medical Specialist Services" of anesthesiologists which were furnished to the VA Medical Center, San Francisco (VAMC). (R4, tab 78) Such services were authorized by 38 U.S.C. § 4117 (now §7409) which provided, in pertinent part:

(a) The Secretary may enter into contracts with institutions and persons described in subsection (b) to provide scarce medical specialist *services at Department facilities*. Such services may include the services of *physicians*, dentists, podiatrists, optometrists, nurses, physician assistants, expanded function dental auxiliaries, technicians, and other medical support personnel.

(b) Institutions and persons with whom the Secretary may enter into contracts under subsection (a) are the following:

(1) *Schools and colleges of medicine*

(emphasis added)

VA Acquisition Regulation (VAAR) 806.302-5 provides that Scarce Medical Specialist negotiated contracts may be "approved for *other* than full and open competition only when such contracts are with institutions affiliated" with the VA. The medical school at UCSF is such an affiliated institution.

Pursuant to this authority, UCSF furnished anesthesiologists to provide services at the Medical Center. These anesthesiologists also frequently "serve[d] on the staff of the VAMC under part time appointments, and/or are also engaged by UCSF to perform other unrelated services for the university." (Prescott Aff. at 1) Following negotiations, the VA entered into Contract V662P-4744 for calendar year 1990 (the 1990 Contract) in which

UCSF agreed to "[p]rovide 3.0 FTE [Full Time Equivalent] Anesthesiologists at an estimated cost of \$563,706." (R4, tab 6) The price negotiation memorandum concerning this contract, indicates that the VA was seeking an "estimated 7,722 hours" for 1990 at an estimated average salary and fringe benefits cost of \$73 an hour. (R4, tabs 3, 5)

Section C of the 1990 Contract, DESCRIPTION/SPECS/WORK STATEMENT provides that:

The VA chief, Anesthesiology Service, shall be responsible for the preparation of a monthly call schedule. The Anesthesiologists shall work the schedule designated . . . in accordance with Sections C and H. This schedule will include regular operation room/intensive care units duties night/weekend emergencies, and other coverage as required in the event of a major disaster.

Section C further lists a number of services to be performed by the anesthesiologists totaling 148.5 hours a week. These include: "[a]dministration of all types of anesthesia" (75 hrs), provision or direction of pre- and post-operative evaluation and care (15 hrs), provision or direction of care for "respiratory and pain problems" (13.5 hrs), "professional direction of medical students, interns, residents and support personnel" (18 hrs), service on professional committees/attendance at "official hospital meetings" (15 hrs), direction and administration of inhalation therapists (6 hrs), and evaluation of "patients for triage in the Surgical Intensive Care Unit" (3 hrs). It should be observed that the 7,772 annual hours required by this schedule in fact equates to 3.7 FTE if the traditional measure of an FTE is utilized (i.e., 40 hrs x 52 wks).

Section H, referred to in Section C, provides that the services will be "furnish[ed] to and at the Veterans Administration Medical Center" during normal work hours which were defined as "8:00 A.M. -- 4:30 P.M. Monday thru Friday." There were special provisions for "emergency cases" which required 24 hour "on-call coverage" with "[a]vailibility within 40 minutes by phone and able to be in hospital operating room and set up within one hour." The VA Medical Center was to maintain a record of all work performed including a "timekeeping record of hours spent by the UCSF anesthesiologists."

Section G of the contract, "CONTRACT ADMINISTRATION DATA," provides under Paragraph 1, "INVOICE AND PAYMENT" that payment is to be made "monthly in arrears" with UCSF submitting an invoice which:

b. . . . must be itemized to include:

1. The Anesthesiologist by name
2. Number of hours of service performed for the VA
3. Monthly breakout of fringe benefits
4. Monthly breakout of any support costs

5. Must cite the contract number

c. The rate of reimbursement will be determined on the basis of the number of hours provided each month to the VA under this contract.

d. The contractor shall be responsible for non-duty weekends, holidays, annual leave, sick leave and educational leave.

In a technical review of the proposed 1990 Contract, as required by VA Acquisition Regulation (VAAR) 801.602-70, officials at VA Central Office in Washington, DC approved the contract with UCSF subject to a number of revisions, including insertion of FAR Clause 52.215-22. (R4, tab 4) Notwithstanding this conditioned approval, the 1990 Contract as executed did not include FAR Clause 52.215-22, PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA, as required by FAR 15.804-8(a). Section K of the Contract, however, did include a CERTIFICATE OF CURRENT COST OR PRICING DATA as required by FAR 15.804-4. This certificate, which is stamped by the "Regents of the University of California, Lorraine M. Petrakis, Director, Office of Research Affairs," provides that the UCSF has provided the required information and that it was "accurate, complete and current as of Feb 07, 1990." (R4, tab 6 at 27)

On November 9, 1990, Brian Cason, Chief, Anesthesiology Service, at the VAMC, (who also held an appointment with UCSF), wrote a memorandum to local procurement officials requesting approval for another negotiated contract with UCSF for calendar year 1991, noting that "agreed upon cost of living increases would be appropriate." (Prescott Aff. at 1) Dr. Cason estimated the need for "services of between 3.0 and 3.5 FTE Anesthesiologists" at a cost of "approximately \$760,000." (R4, tab 7) Because the proposed contract was in excess of \$500,000, the San Francisco VAMC was apprised that an audit by the Department of Health and Human Services (HHS) would be required. VA Central Office assigned an "Audit Control Number" to the request and directed the Medical Center to provide a copy of its HHS audit request letter to the VA Office of the Inspector General (OIG). (R4, tab 89)

Because the 1991 contract could not be executed until after the audit was completed, the VAMC Director sought approval from Washington for "interim 90 day (1/1/91--3/31/91) Purchase Orders . . . [for] Anesthesiologist--Scarce Medical (\$179,000)." (R4, tab 8) Approval was forthcoming from VA Central Office in a telegraphic message (TWX)-not furnished or communicated to UCSF-which noted, *inter alia*:

Continued requests for interim purchase order authority will not be approved . . . new prices may not be implemented under an interim purchase order authority. Clauses, certifications, and provisions required by FAR, VAAR and uniform contract format should be incorporated . . . You are responsible for developing a price negotiation memorandum which complies with FAR/VAAR 15/815-808. A record keeping system must be developed which assures that VA pays only for actual services performed under contract.

(R4, tab 10; Cmpl't ¶15; Ans. ¶15)

Record keeping as to "actual services performed" was apparently something of an issue. Previously, on March 2, 1990, Dr. Barbara Jean Lyden, Assistant Chief of Staff at the VAMC, who was the Contracting Officer's Technical Representative (COTR) for the 1990 Contract, had informed the Contracting Officer that there were "serious problems with the billing process, the time keeping & the understanding by the Anesthesiology Staff (faculty) of the letter of the contract . . . The surgery schedule & the [Intensive Care] workload does not support their billing." (R4, tab 82) Dr. Lyden stated that the time spent by UCSF anesthesiologists was "significantly less than the contract required." (Lyden Aff.)

On January 16, 1991, the VA and UCSF entered into Supplemental Agreement #1 to the 1990 Contract extending the performance period to March 31, 1991. The "estimated cost per month" was "increased to \$59,583.33." All other terms and conditions were to "remain the same." (R4, tab 11) K. W. Thomas acted as Contracting Officer (CO) for the VA. The monthly cost in Supplemental Agreement # 1 represented a 27% increase over the \$46,975.50 monthly rate which had been paid during 1990. UCSF did not submit, nor was it requested to submit, cost or pricing data, a Standard Form (SF) 1411, or a SF 1412 requesting exemptions from the requirement to submit cost or pricing data. (Cmplt ¶14, Ans. ¶14) No price negotiation memorandum was prepared. (Prescott Aff. at 2)

The day after the parties signed the three month interim authority, Dos Miller, Chief, Acquisition and Material Management Service at the VAMC sent UCSF officials a Request for Proposal (RFP) 662-20-91 for the 1991 scarce medical services contract, noting that FAR 15.804-2 "requires certified cost and pricing data . . . [which] must be submitted on a Standard Form 1411." (R4, tab 12) UCSF responded with a Standard Form 1411 dated March 1, 1991, which included the following information:

Total Cost, Initial Year \$726,997.00
COMPRISED OF:

1) SALARY AND FRINGE COST FOR AVERAGE
ANESTHESIOLOGIST:

\$170,000 salary cost plus \$47,600 (28%) fringe benefit cost

Salary/fringe cost of 1 FTE: \$217,600
\$217,600 times 3 FTE: \$652,800

2) ADMINISTRATIVE COST (APPROX 10%): \$74,197

Total Salary Cost of \$652,800 plus Administrative Cost of \$74,197=\$726,997

Option Year Prices reflect 5% annual increase for inflation

(R4, tab 13)

This prompted Chief Miller to write to UCSF that he needed "additional supporting information showing how you arrived at the prices offered" which would include "the major categories and subcategories and how UCSF would allocate them to the proposed

contract." (R4, tab 14)

Because the three month interim authority expired on March 31, 1991, and because the 1991 follow on contract had not been negotiated, the VAMC sought an additional 3 month extension to the 1990 Contract under the same terms and conditions as the first extension. (R4, tab 15) Central Office approval was granted by facsimile transmission on April 12, 1991, which repeated the prior caution that new prices could not be implemented under an interim purchase authority and that a price negotiation memorandum was required. (R4, tab 15) Supplemental Agreement # 2 extending the 1990 Contract another three months to June 30, at an additional cost of \$178,749.99 was executed by the parties on April 19, 1991. (R4, tab 18) Again, there was no submittal of either SF 1411 or 1412 and no price negotiation memorandum was prepared. K.W. Thomas signed as Contracting Officer for the VA.

During this same period, UCSF transmitted to the VA on April 8, 1991, "cost and pricing documentation" in connection with RFP 662-20-91 (the proposed 1991 Contract). (R4, tab 16) The information, in the form of a letter from Dr. Ronald Miller, Chairman of UCSF's Department of Anesthesia, was directed to Jerry Prescott, a contract specialist at the San Francisco VAMC who was acting as contracting office liaison for negotiation of the new scarce medical services contract. (Prescott Aff. at 1) Dr. Miller wrote that he was "unable to give . . . anything but an average salary cost for the anesthesiologist who will be providing services . . . as the identity of the particular physicians will change throughout the contract period." He said the average salary rate was \$170,000 and the "average fringe benefit rate, reflecting all university benefits, is 28%." He added:

Historically, this contract has allowed for 10% direct administrative cost over and above the salaries of the anesthesiologists. There are always administrative costs associated with clinical activities (staff assistance with producing clinical schedules and other documentation, communications activities, financial and payroll activities relative to physician personnel, etc.).

Dr. Miller concluded by stating that there was "no indirect cost associated with this contract" and that he hoped that he had answered any "questions regarding the basis for the \$726,997 annual contract price."

Following receipt of Dr. Miller's letter, the VAMC Director, on April 16, 1991, transmitted a copy of the proposed contract to the Medical Resource Sharing Office in Washington for "review and approval in accordance with VAAR 801.602-70(a)(4)(vi) and 815.7001(c)." (R4, tab 17) On the same date, CO Thomas formally requested HHS to perform a pre-award audit of the proposed 1991 Contract, attaching the SF-1411 previously furnished by UCSF, as well as the additional information transmitted by Dr. Miller. (R4, tab 89)

On June 12, 1991, the San Francisco VAMC Medical Director requested a third 90 day extension of the existing scarce medical services contract on the same terms and conditions as the earlier extensions. Approval was granted by VA Central Office on June 20, again "subject to compliance" with attached standard language stating that "new prices" could not be implemented under interim authority and that a price negotiation

memorandum was required. (R4, tab 19) Supplemental Agreement # 3 executed by the Contracting Officer on July 17 extended the contract until September 30, 1991, for an additional \$178,749.99. (R4, tab 20) As with the previous contract extensions, there was no submittal of either SF 1411 or 1412 and no price negotiation memorandum was prepared.

Previously, by letter dated June 13, 1991, HHS had transmitted to the VA Inspector General, with a copy to CO Thomas, its audit of proposed 1991 Contract. (R4, tab 91) Noting that it "*did not evaluate the quantities or categories of labor and other direct cost elements proposed*," HHS said that the audit was to determine the "reasonableness and propriety of the estimated costs proposed in accordance with Federal cost principles and University policies and procedures." (Emphasis added) HHS determined that \$650,502 of the \$726,997 in proposed costs were "reasonable and acceptable for pricing purposes" with the remaining \$76,495 "set aside for awarding agency determination."

Proposed salaries were found to be "reasonable and acceptable . . . based on current or approved salary rates for employees scheduled to work on the project." \$74,005 originally shown as part of fringe benefits were reclassified as salary expenses because it represented the salary of an "on-call" anesthesiologist. Certain other adjustments were made to fringe benefits. Some \$13,795 in fringe benefits for non-physician personnel were also set aside pending a VA determination with respect to "Administrative" costs in general. Turning to those costs, HHS found \$11,497 of the proposed \$74,197 in direct administrative costs to be acceptable. That is, it represented:

supplies and expenses of \$27,812 based on historical costs, offset